STATE OF MICHIGAN

COURT OF APPEALS

LEE CHURCHILL, NANCY CHURCHILL, and LEE D. CHURCHILL REVOCABLE LIVING TRUST,

Plaintiffs/Counter Defendants-Appellants,

v

BRYAN SWARTHOUT,

Defendant/Counter Plaintiff-Appellee.

UNPUBLISHED
April 11, 2006

No. 257151, 260843
Genesee Circuit Court
LC No. 02-074654-CK

LEE CHURCHILL, NANCY CHURCHILL, and LEE D. CHURCHILL REVOCABLE LIVING TRUST,

Plaintiffs/Counter Defendants-Appellees,

v

BRYAN SWARTHOUT,

Defendant/Counter Plaintiff-Appellant.

No. 262093
Genesee Circuit Court
LC No. 02-074654-CK

Before: Meter, P.J., Whitbeck, C.J. and Schuette, J.

PER CURIAM.

In this case involving contracts for the sale of property, this Court addresses three consolidated appeals. In Docket No. 257151, plaintiffs appeal the trial court's granting of defendant's motion for summary disposition on plaintiffs' third amended complaint. In Docket No. 260842, plaintiffs appeal the trial court's grant of defendant's motion for case evaluation sanctions. In Docket No. 262093, defendant appeals the trial court's denial of his request for entry of a money judgment, taxable costs, and prejudgment interest. We affirm.

I. Facts

This case stems from plaintiffs' attempted sale of two pieces of land to defendant. Lee and Nancy Churchill (the Churchills) and the Lee D. Churchill Revocable Trust (the Trust) owned a little over 29 acres of land in Genesee County. The land consists of three parcels; a vacant waterfront lot, a residence, and an equestrian center. The Churchills attempted to sell the land through a realtor for two years, but were unsuccessful. Eventually, the Churchills were contacted by JP King, an auction company, and in May 2002, they entered into a contract with JP King to auction the land.

The auction was held on August 14, 2002. The Churchills indicated that they would be willing to sell the land as one parcel or to sell it in three individual parcels. The Churchills had a total reserve of $4.5 million and they were informed by a representative of JP King that if the reserve was not met, they would try to negotiate a price between the bidder and the Churchills. Defendant, a neighbor of the Churchills, was the high bidder on Parcel 1 (the residence) and on Parcel 3 (the equestrian center), but neither bid met the Churchills' reserve. However, the Churchills negotiated with defendant through a JP King representative and agreed to sell Parcel 1 for $2,250,000 and Parcel 3 for $1,600,000.

The parties entered into purchase agreements titled, "Auction Real Estate Sales Contract," for both Parcels 1 and 3. The purchase agreement for Parcel 1 identified that land to be sold as "'SAILAWAY FARMS EQUESTRAIN (sic) ESTATE' PARCEL # 1, located in the County of Genesee, State of Michigan, and more particularly described on the Title Commitment as attached to this Auction Real Estate Contract." The purchase agreement for Parcel 3 contained the same language, except the parcel number was changed to 3. The contracts also stated that Parcel 1 was zoned residential and Parcel 3 was zoned agricultural, and listed applicable easements for each parcel. No further property descriptions were given and contrary to the stated language contained in each purchase agreement, the Title Commitment was not attached to either purchase agreement. Plaintiffs subsequently presented an affidavit from a representative of JP King that stated that defendant was given a copy of the Title Commitment. However, the Title Commitment that was given to defendant contained different property descriptions for Parcels 1 and 3, than the Parcels 1 and 3 the Churchills intended to convey under the purchase agreements.

Both purchase agreements were signed by Lee Churchill, Nancy Churchill, and defendant. Defendant put a total of $385,000 down as an earnest money deposit. Closing was scheduled to take place on September 16, 2002. On September 9, 2002, defendant informed the Churchills that he would not be closing on the purchase of Parcels 1 or 3.

On October 3, 2002, the Churchills, filed a complaint against defendant alleging counts of specific performance of the two purchase agreements, breach of contract, and intentional infliction of emotional distress. On September 29, 2003, the Churchills filed a first amended complaint, which contained the same allegations but had additional exhibits attached. On January 12, 2004, the court heard defendant's motion for summary disposition. The trial court granted the motion with regard to the Churchills' claim for intentional infliction of emotional distress but denied summary disposition as to the remainder of the Churchills' complaint.

On January 28, 2004, the Churchills filed a second amended complaint, adding the Trust as a plaintiff. On March 8, 2004, on defendant's motion, the court reconsidered the denial of summary disposition on the first amended complaint and the Churchills' claims. The trial court granted summary disposition on the Churchills' claims, finding that the statute of frauds voided the contracts because not all the owners of the property signed the purchase agreements. The court also found that the purchase agreements contained inadequate descriptions of the land that was to be sold and found summary disposition for defendant appropriate on that ground also. The court further held that the Churchills had violated a township land division ordinance and that there was no allegation of any mutual mistake or fraud to allow reformation of the contract. The court dismissed the first amended complaint in its entirety.

Defendant then filed a motion under MCR 2.116(C)(8) to dismiss plaintiffs' second amended complaint, which included claims on behalf of the Trust. On April 12, 2004, the court granted defendant's motion, but because defendant filed the motion under (C)(8), the court allowed plaintiffs to file an amended complaint to attempt to state a claim for relief on behalf of the Trust. On May 26, 2004, plaintiffs filed a third amended complaint, which contained claims on behalf of the trust, but also on the Churchills' behalf. On June 28, 2004, the trial court granted defendant's motion for summary disposition again, citing the statute of frauds and an inadequate property description. The court found that the land division ordinance was no longer an issue and again found no evidence of mutual mistake to justify reformation of the contracts. The court also ordered plaintiffs to return defendant's deposit of $385,000.

On July 29, 2004, defendant filed a motion for the entry of a judgment in defendant's favor, which would have included statutory interest from the date of the filing of the complaint to the date defendant was returned his deposit money. On the same date, defendant also filed a motion for case evaluation sanctions, alleging that all parties rejected the case evaluation and that the judgment was more favorable to defendant than the case evaluation award. On August 30, 2004, the court declined to enter a money judgment against plaintiffs and declined to award interest. The trial court also declined to order case evaluation sanctions, citing the interest of justice exception under MCR 2.403(O)(11). On November 1, 2004, the court granted defendant's motion for reconsideration in part and found that the interest of justice exception did not apply in this case and that defendant was entitled to case evaluation sanctions. On January 24, 2005, the court awarded defendant $100,000 in case evaluation sanctions.

II. Purchase Agreements

Plaintiffs argue that the trial court erred in finding that the descriptions of the property contained in the purchase agreements did not adequately identify the property to be sold. We disagree.

A. Standard of Review

This Court reviews the granting of summary disposition de novo. *Kelly-Stehney Assoc Inc v MacDonald's Industrial Products, Inc* (*On Remand*), 265 Mich App 105, 110; 693 NW2d 394 (2005). "Similarly, '[t]his Court reviews de novo questions of law such as whether the statute of frauds bars enforcement of a purported contract.'" *Id*., quoting *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995).

B. Analysis

The trial court did not err in concluding that the purchase agreements were void because they contained inadequate descriptions of the land to be sold.

"The *substance* of a binding contract for the sale of land is a subject separate from its sufficiency under the statute of frauds and one that is governed by the general contract law concept that there must be a meeting of the minds regarding the 'essential particulars' of the transaction." *Zurcher v Herveat*, 238 Mich App 267, 279; 605 NW2d 329 (1999) (emphasis in original). A contract for the sale of land "'must generally be in writing and must set forth the terms of the agreement with sufficient certainty and definiteness, specifying the identities of the parties and their mutual assent, the property which is the subject of the contract, the price of such property, and the consideration.'" *Id*. at 282, quoting 77 Am Jur 29, Vendor and Purchaser, § 5, pp 121-122. The property description will be acceptable "'if it discloses with sufficient certainty what the intention of the grantor is with respect to the quantity and location of the land to which reference is made so that its identification is practicable.'" *Id*., quoting 77 Am Jur 29, Vendor and Purchaser, § 11, p 126. Further,

> "[a] description is sufficient if when read in the light of the circumstances of possession, ownership, situation of the parties, and their relation to each other and to the property, as they were when negotiations took place and the writing was made, it identifies the property." [*Stanton v Dachille*, 186 Mich App 247, 259; 463 NW2d 479 (1990) (citations omitted).]

This Court has found that some defects in a property description in a contract for the sale of land do not render the contract unenforceable. *Zurcher*, *supra* at 293-294. In *Zurcher*, the Court found that the listing of the wrong county in the purchase agreement did not render the agreement unenforceable considering the situation of the parties. *Id.* The purchase agreement did contain the proper township and stated that the property was on "Rabbit Bay." *Id.* Further, the legal description contained in the purchase agreement was correct, with the exception of the county listed. *Id*. at 272-274.

Here, however, the purchase agreement did not contain an adequate description of the property that was the subject of each agreement. The purchase agreement for Parcel 1 described the property as follows: "'SAILAWAY FARMS EQUESTRAIN (sic) ESTATE' PARCEL # 1, located in the County of Genesee, State of Michigan, and more particularly described on the Title Commitment as attached to this Auction Real Estate Contract." The only other description of Parcel 1 was "Parcel #1 (home) . . . [is] zoned residential." The title commitment was not attached to the purchase agreements. Therefore, besides describing Parcel 1 as the home and stating that Parcel 1 was known as Sailaway Farms Equestrian Estate and located in Genesee County, Michigan, there was no real description of what portion of the property Parcel 1 contained. The same holds true for Parcel 3. Parcel 3 was described in the purchase agreement as follows: "'SAILAWAY FARMS EQUESTRAIN (sic) ESTATE' PARCEL # 3, located in the County of Genesee, State of Michigan, and more particularly described on the Title Commitment as attached to this Auction Real Estate Contract." Again, no title commitment was attached to the purchase agreement. The only further description of Parcel 3 in the actual contract was that "Parcel #3 (Equestrian Center) is zoned agricultural," which is an inaccurate description as evidence presented to the trial court showed that part of Parcel 3 was zoned agricultural and part

was zoned residential. Therefore, the descriptions of the land in the purchase agreements were not adequate.

However, "parole evidence is admissible to supplement, but not contradict, the understanding of the parties." *Stanton*, *supra* at 259, citing *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 367; 320 NW2d 36 (1982). Plaintiffs presented an affidavit from a representative of the auction company that stated that defendant was given the Title Commitment referenced in the purchase agreements. However, the Title Commitment described different sections of land as Parcel 1 and 3. Neither party disputes that the Parcel 1 and the Parcel 3 mentioned in the Title Commitment is not the land plaintiffs wished to sell as Parcel 1 and Parcel 3 in the purchase agreement. Thus, neither the purchase agreements, nor the documents referenced in the purchase agreements contain accurate descriptions of the property to be purchased. In facts, plaintiffs did not even draft a document that specifically identified the property for sale until after they filed this lawsuit.

These descriptions did not "'disclose [] with sufficient certainty what the intention of the grantor [was] with respect to the quantity and location of the land to which reference [was] made so that its identification [was] practicable.'" *Zurcher*, *supra* at 282 (citations omitted). Even though defendant lived next door to plaintiffs and was familiar with their land in general, defendant did not contract to purchase plaintiffs' entire estate, only a portion of it. From the purchase agreements, it was completely unclear what portions of land defendant was purchasing. This was not a case, like *Zurcher*, *supra* at 293-294, where the legal description merely contained an error, in that it listed the wrong county. Here, there were no legal descriptions in the purchase agreements for the parcels plaintiffs intended to convey, and the legal descriptions that were in the Title Commitment were for completely different pieces of land. Although defendant could ascertain from the purchase agreements that he was purchasing a home as part of Parcel 1 and an equestrian center as part of Parcel 3, there was no indication of what land was to be conveyed along with the home or the equestrian center.

The trial court correctly found that the purchase agreements were not valid contracts. Thus, the trial court neither erred in refusing to award specific performance of the purchase agreements nor in refusing to reform the invalid purchase agreements. In light of our holding, we find it unnecessary to address whether the trial court erred in finding the purchase agreements void under the statute of frauds for lack of a signature on behalf of the trust.

III. Case Evaluation Sanctions

Plaintiffs next argue that the trial court erred in granting defendant's motion for case evaluation sanctions. According to plaintiffs, the trial court should have invoked the interests of justice exception under MCR 2.403(O)(11) because defendant's conduct can be classified as misconduct and gamesmanship. We disagree.

A. Standard of Review

"If applicable to the circumstances, the imposition of case evaluation sanctions is mandatory, and a court's decision whether to grant sanctions is a question of law subject to de novo review on appeal." *Cusumano v Velger*, 264 Mich App 234, 235; 690 NW2d 309 (2004). However, plaintiffs' sole issue with respect to the award of case evaluation sanctions involves

the "interest of justice" exception under MCR 2.403(O)(11), which gives the court limited discretion to deny an award of case evaluation sanctions. Accordingly, this Court reviews this issue for an abuse of discretion *Stitt v Holland Abundant Life Fellowship* (*On Remand*), 243 Mich App 461, 472, 476; 624 NW2d 427 (2000) (applying the interest of justice standard under MCR 2.405[D][3]); see also *Luidens v 63rd Dist Court*, 219 Mich App 24, 37; 555 NW2d 709 (1996).

B. Analysis

The trial court did not abuse its discretion when it declined to invoke the "interest of justice" exception to deny defendant's request for "actual costs" and instead awarded $100,000 in case evaluation sanctions.

A primary issue arising out of a ruling on case evaluation sanctions is whether the trial court abused its discretion by failing to invoke the interest of justice exception under MCR 2.403(O)(11) to decline to award any case evaluation sanctions. The interplay of the rules governing a rejecting party's liability for costs is essential to analyzing the arguments of the parties. Subsection (11) is an exception to the mandatory rule set forth in MCR 2.403(O)(1):

> If a party rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the mediation evaluation.

Subsection (11) provides:

> If the verdict is a result of a motion provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs.

The court rules do not define the term "interest of justice," so the court must evaluate "the language and purpose of the rule" for assistance in determining its meaning. *Haliw v Sterling Heights*, 266 Mich App 444, 447; 702 NW2d 637 (2005), quoting *Luidens, supra* at 31. "The term 'interest of justice' in MCR 2.403(O)(11) must not be too broadly applied so as to swallow the general rule of subsection 1 and must not be too narrowly construed so as to abrogate the exception." *Id*. at 448, quoting *Haliw v Sterling Heights*, 257 Mich App 689, 706-707; 669 NW2d 563 (2003).

> Further,
> "factors normally present in litigation, such as a refusal to settle being viewed as 'reasonable,' or that the rejecting party's claims are 'not frivolous,' or that disparity of economic status exists between the parties, are insufficient 'without more' to justify not imposing sanctions in the 'interest of justice.' Rather, the unusual circumstances necessary to invoke the 'interest of justice' exception may occur where a legal issue of first impression is presented, or

> 'where the law is unsettled and substantial damages are at issue, where a party is indigent and an issue merits decision by a trier of fact, or where the effect on third persons may be significant . . . .'
>
> * * *
>
> 'Other circumstances, including misconduct on the part of the prevailing party, may also trigger this exception.'"
>
> [*Id*. at 448-449 (citations omitted).]

Lastly, "the fact that sanctions may have a chilling effect on future litigation is not an unusual circumstance. Indeed an award of costs is intended to have some chilling effect in order to encourage settlement and to deter protracted litigation." *Id*. at 450-451.

None of the factors that trigger the exception set forth in *Luidens* are present in this litigation. However, plaintiffs allege "misconduct" on the part of defendant in the form of "gamesmanship." After reviewing the trial court's decision regarding the case evaluation sanctions for an abuse of discretion, we conclude that defendant did not behave in a manner that justifies invocation of the interest of justice exception. This case has a complex procedural history, but the circumstances are typical rather than unusual. Although defendant filed a motion in limine instead of a motion for summary disposition, the mistake did not give defendant an unfair advantage over plaintiffs. The expenses incurred by defendant after the case evaluation on July 23, 2003, were a result of plaintiffs making amendments to their complaint. Furthermore, defendant provided the court with a detailed description of the subsequent attorney fees and costs incurred from August 22, 2003 to January 24, 2005, as a result of a new trial schedule.

"[A]bsent unusual circumstances, the 'interest of justice' does not preclude an award of attorney fees . . . ." *Luidens*, *supra* at 32. Defendant is entitled to actual costs including attorney fees despite the fact that both parties rejected the case evaluation. *See Zalut v Andersen & Assoc, Inc*, 186 Mich App 229, 232-234; 463 NW2d 236 (1990). Plaintiffs allege the trial court erred in awarding defendant all of his attorney fees, including the services of paralegals and law clerks. A verdict under subrule (O)(2)(c) is entered as "a result of a ruling on a motion after rejection of the case evaluation," and the term "actual cost" includes both court costs and reasonable attorneys fees. MCR 2.403(O)(6). Under MCR 2.626, "the time and labor of any legal assistant who contributed nonclerical, legal support under the supervision of an attorney provided the legal assistant meets the criteria set forth in Article 1,§ 6 of the Bylaws of the State Bar of Michigan," are included in an award of attorney fees. The services of the law clerk and legal assistant satisfy the criteria found in the Michigan Court Rules and the Michigan State Bar Bylaws. The trial court's careful consideration of these actual costs requested by defendant is evidenced by the fact the trial court did not award the full amount.

Plaintiffs also raise various tax issues regarding the manner in which defendant and Argus & Associates, Inc. reported the case evaluation sanctions on the federal income tax returns. The sole basis of this argument is that defendant did not directly pay the attorney fees and, therefore, should not be awarded sanctions. However, MCR 2.403(O) provides that case evaluation sanctions are awarded to "parties" in the litigation. Defendant is the sole owner of

Argus & Associates, Inc. and bills all attorney fees through his company. Defendant, not Argus & Associates, Inc. is a party to the litigation; thus, he must collect the sanction awards.

IV. Money Judgment

Defendant argues that the trial court erred when it failed to enter a judgment in his favor in the amount of $385,000 plus taxable costs and case evaluation sanctions, with prejudgment interest on the entire amount from the date the counterclaim was filed until the date judgment was entered and post judgment interest on the judgment from the date the judgment was entered until it is paid in full. We disagree.

A. Standard of Review

This Court reviews de novo the decision whether to award prejudgment interest under MCL 600.6013. *Beach v State Farm Mut Automobile Ins Co*, 216 Mich App 612, 623-624, 550 NW2d 580 (1996).

B. Analysis

The trial court did not err in refusing to grant defendant a money judgment including taxable costs and case evaluation sanctions, with prejudgment interest on the total judgment from the date the complaint was filed because the return of the earnest deposit did not constitute a money judgment.

The trial court declined to award a money judgment plus taxable costs against plaintiffs because section 2(c) of the Auction Real Estate Contract required that defendant's earnest deposit be held by Cislo Title Company in a non-interest bearing account. Further, the trial court noted that paragraph 23 of the purchase agreements provided:

> The invalidity of any provision of this contract shall not affect the validity or enforceability of any other provision set forth herein.

The trial court declined to award interest on the earnest money because "[p]laintiff had not had the benefit of the money any more than Defendant had, it having been held by the escrow agent . . . ."

MCL 600.6013 provides that interest is allowed on a money judgment recovered in a civil action. "A money judgment" is one which adjudges the payment of a sum of money as distinguished from directing an act to be done." *City of Warren v Dannis*, 136 Mich App 651, 662-633; 357 NW2d 731 (1984). Plaintiffs argue that, here, the trial court did not order anyone to actually pay a sum of money, rather the court directed an act to be done, i.e. that the title company return defendant's earnest deposit.

Defendant argues that *Marina Bay Condominiums, Inc v Schlegel*, 167 Mich App 602; 423 NW2d 284 (1988), stands for the proposition that the award of a deposit is a money judgment for the purposes of prejudgment interest under MCL 600.6013. *Marina Bay* involved a contract concerning condominiums that were offered for sale by the plaintiff. *Id*. at 604. The plaintiff brought an action for breach of contract of sale of a condominium unit after the

defendants filed a complaint with the condominium section of the Corporation and Securities Bureau seeking return of $2,600 from the plaintiff. *Id*. Following a bench trial, the *Marina Bay* trial court found that the parties had an option contract and entered judgment for plaintiff for $2,600, together with costs and interest. *Id.*. This Court concluded that the trial court's award of interest to the plaintiff on the $2,600 money judgment was proper. *Id*. at 607.

Plaintiffs argue that this case can be distinguished from *Marina Bay* because, in that case, the trial court awarded the seller the purchaser's deposit. Therefore, unlike in this case, the deposit in *Marina Bay* constituted damages, whereas here, the award of money is not a "payment." In this case, defendant was merely returned money that he knew was being held in a non-interest bearing account.

Here, the trial court directed the title agency to return defendant's earnest money but did not actually adjudge that plaintiffs should pay defendant any money. A "payment of money" was never actually ordered. Thus, we uphold the trial court's denial of defendant's motion for reconsideration as it relates to defendant's motion for entry of judgment.

Affirmed.

/s/ Patrick M. Meter
/s/ William C. Whitbeck
/s/ Bill Schuette